STATE OF MICHIGAN

IN THE SUPREME COURT

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Appeal from the Court of Appeals

The Honorable Patrick M. Meter, the Honorable William C. Whitbeck, and the Honorable Bill Schuette

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BUDDY MILLER,

Plaintiff-Appellant,

-vs-

Supreme Court No. **130808**

CHAPMAN CONTRACTING, SWEEPMASTER, INC., RAMZY KIZY, JR. and KEVIN PAPERD,

Court of Appeals No. 256676

Lower Court No. 03 053572 NI

Defendants-Appellees.

130808
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SUPPLEMENTAL BRIEF OF DEFENDANTS-APPELLEES CONCERNING PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

PROOF OF SERVICE

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Dated: September 6, 2006

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

The Plaintiff was injured in an automobile accident with the Defendant. The Plaintiff subsequently filed for personal bankruptcy. Later, the Plaintiff, in his own name and with no reference whatsoever to his ongoing personal bankruptcy, sued the Defendant for the accident. The trial court found that the Plaintiff had no standing to sue because his rights had been transferred to the trustee in bankruptcy, and the trustee could not bring suit because of the running of the statute of limitations. The Court of Appeals affirmed the trial court, holding that allowing an amendment of the Plaintiff's Complaint would have been futile due to the running of the statute of limitations. Should the Supreme Court affirm the Court of Appeals?

Plaintiff would presumably contend the answer to the question is **"No."**

The Defendants respectfully suggest the answer to the question should be **"Yes."**

The trial court, the Honorable Fred M. Mester (Judge Mester) of the Oakland County Circuit Court, was not asked the question and it is not known how he would answer it.

The Court of Appeals, the Honorable Patrick M. Meter (Judge Meter), the Honorable William C. Whitbeck (Chief Judge Whitbeck) and the Honorable Bill Schuette (Judge Schuette), was not asked the question and it is not known how the Court of Appeals would answer it.

INTRODUCTION

Plaintiff-Appellant Buddy Miller (hereinafter Plaintiff) filed this personal injury motor vehicle accident case in his own name, without reference to the fact that he was, at the time he filed suit, undergoing personal bankruptcy. The Defendants-Appellees (the Defendants) noted Plaintiff's lack of standing—whatever rights he had against the Defendants for the injuries he allegedly suffered in the accident had been transferred to the Trustee in Bankruptcy once he filed for bankruptcy—at the beginning of the case, but Plaintiff took no steps to deal with his lack of standing. Only after the Defendants moved for summary disposition on the basis Plaintiff lacked standing to sue did Plaintiff attempt to name the Trustee in Bankruptcy as the Plaintiff. The trial court found Plaintiff's attempt to amend his Complaint futile, as the statute of limitations had run by the time Plaintiff filed his Motion to Amend. The Court of Appeals agreed with the trial court.

Plaintiff sought leave to appeal the decision of the Court of Appeals (and, in effect, the decision of the trial court) to this Supreme Court. The Defendants opposed the Application. On July 28, 2006, this forum issued an Order indicating it would entertain oral argument on Plaintiff's Application, and invited both Plaintiff and the Defendants to submit supplemental briefs by September 8, 2006, providing the supplemental briefs did not merely restate arguments made in Plaintiff's Application and the Defendants' Answer thereto.

This is the Supplemental Brief of the Defendants.

SUPPLEMENTAL ARGUMENT

The Plaintiff was injured in an automobile accident with the Defendant. The Plaintiff subsequently filed for personal bankruptcy. Later, the Plaintiff, in his own name and with no reference whatsoever to his ongoing personal bankruptcy, sued the Defendant for the accident. The trial court found that the Plaintiff had no standing to sue because his rights had been transferred to the trustee in bankruptcy, and the trustee could not bring suit because of the running of the statute of limitations. The Court of Appeals affirmed the trial court, holding that allowing an amendment of the Plaintiff's Complaint would have been futile due to the running of the statute of limitations. The Supreme Court should affirm the Court of Appeals.

In *Employers Mutual Insurance Company v Petroleum Equipment Company*, 190 Mich App 57, 63; 475 NW2d 418 (1991), the Court of Appeals stated:

> Although an amendment generally relates back to the date of the original filing if the new claim asserted arises out of the conduct, transaction, or occurrence set forth in the original pleading, MCR 2.118(D), the relation-back document does not extend to the addition of new parties.

The *ratio decidendi* for the principle quoted above is intuitively obvious. Any contrary rule would have the effect of rendering a statute of limitations essentially meaningless. That is, a party could avoid the bar of the statute of limitations by simply joining, perhaps years after the statute of limitations had run, ongoing litigation as a new party. By refusing to apply the relation-back doctrine to new parties, the problem of "end runs" around the statute of limitations is completely avoided.

The principle established in *Employers Mutual* is, as a result of MCR 7.215(J)(1), the controlling law of Michigan. It avoids the problem inherent in the earlier rule enunciated in

Hayes-Albion v Whiting Corporation, 184 Mich App 410; 459 NW2d 47 (1990), which permitted new parties to relate-back to the filing of a lawsuit, and thus avoid the bar of the statute of limitations, whenever a defendant had notice and would not be prejudiced. The problem, of course, is that there will almost always be disputes over both notice and prejudice. By contrast, the statute of limitations presents a bright line rule or test.

This is not an inherently unfair or harsh rule or test. It is well settled that statutes of limitations are no longer a disfavored defense. Rather, they are perfectly meritorious defenses. *Bigelow v Walraven*, 392 Mich 566, 570; 221 NW2d 328 (1974); see also *Lothian v City of Detroit*, 414 Mich 160; 324 NW2d 9 (1982). This Supreme Court has even gone so far as to note that any exception to a statute of limitations is to be strictly construed. *Mair v Consumers Power Company*, 419 Mich 74, 80; 348 NW2d 256 (1984), citing with approval *Bock v Collier*, 175 Or 145; 151 P2d 732 (1944); *Woodruff v Shores*, 354 Mo 742; 190 SW2d 994 (1945); *Slade v Slade*, 81 NM 462; 468 P2d 627 (1970); and *Lake v Leitch*, 550 P2d 935 (Okla, 1976).

There is no reason to create an exception here. At the very least, this would be an absolutely terrible case to do so. It is undisputed that Plaintiff's lack of standing to bring the instant lawsuit against the Defendants was pointed out in the Defendants' first responsive pleadings—and **before** the statute of limitations had run. Plaintiff was on notice that he had a standing problem when he still had time—a substantial amount of time, in fact—to do something about it. Plaintiff instead opted to ignore the problem until it was too late to correct the matter. Thus, either granting Plaintiff's Application or giving Plaintiff relief from the decisions of the Court of Appeals and the trial court will, in effect, reward a lack of diligence. As the saying goes, this is not the best way to run a railroad.

It is important to remember that the Trustee in Bankruptcy was alerted to Plaintiff's potential cause of action against the Defendants when Plaintiff filed his petition for bankruptcy. That was before the statute of limitations ran. The petition specifically mentioned his claim against the Defendants (and Plaintiff's belief that the value of the claim was $27,075.00). The Trustee opted to do nothing about the claim until **after** the statute of limitations had run. So, while the Defendants may well have had notice of the Trustee's interest before the statute ran, there's no question the Trustee did. It was the Trustee's responsibility to act in a timely manner—and the Trustee did not do so. Plaintiff, to his credit, does not suggest that anything the Defendants did or failed to do were a factor in the Trustee's failure to act. Indeed, Plaintiff really offers no explanation for the Trustee's failure to act, except to somewhat weakly note it was an error of counsel.

Plaintiff places a great deal of emphasis on *Hurt v Michael's Food Center*, 220 Mich App 169; 559 NW2d 660 (1996), *lv den and recon* 456 Mich 898; 572 NW2d 3 (1997). *Hurt*, however, ultimately **followed** *Employers Mutual*. Plaintiff, therefore, is asking this forum to reject a decision consistently and correctly followed by lower courts for 16 years—and, more importantly, a decision that has as solid a *ratio decidendi* as one is likely to find in the proverbial long day's march.

Statutes of limitations either mean something or they do not. *Employers Mutual* stands for their enforcement while, at bottom, Plaintiff wants them to be ignored whenever it is convenient for a party to do so.

Plaintiff was not merely correcting a misnomer when he sought to file his Amended Complaint naming the Trustee in Bankruptcy as the Plaintiff. Plaintiff transferred his rights, whatever they were, against the Defendants for the accident to the Trustee in Bankruptcy, both a

separate human person and a separate legal entity, so to speak. Plaintiff opted to file bankruptcy and must be assumed, as a matter of law, to know what it entailed. At the very least, the information as to what it entailed was readily available to him. He opted to ignore the law, and to file a suit that he had no standing to file. Even when the problem was pointed out to him, he took no action—until it was too late for him to take action under the well-settled principle established in *Employers Mutual*.

Plaintiff and the Trustee in Bankruptcy are no different from any other party with a potential claim against another who opts to sit on his or her hands until after the statute of limitations runs. Further, the Defendants are no different than any other party involved in an accident. They either know or should know that they can be sued, assuming *arguendo* they might have some responsibility for the accident. Thus, the Defendants' knowledge that the Trustee in Bankruptcy was, so to speak, "out there" before the statute of limitations ran is essentially meaningless.

Finally, the idea that the Defendants would not be prejudiced by the substitution of the Trustee in Bankruptcy for Plaintiff is ludicrous. How could they **not** be prejudiced? Plaintiff had (and has) no standing to bring suit against them, while the Trustee in Bankruptcy did, at least until his claim was barred by the statute of limitations. Allowing Plaintiff to evade—for that is what it is—the statute of limitations prejudices the Defendants in the extreme because it allows the Trustee to bring an otherwise time-barred claim against the Defendants.

CONCLUSION AND REQUEST FOR RELIEF

For the foregoing reasons, the Defendants respectfully request the Supreme Court to issue an Order that denies Plaintiff's Application for Leave to Appeal the February 16, 2006 decision and opinion of the Court of Appeals in the above-entitled cause of action for the reason there is no merit in the grounds presented in Plaintiff's Application.

In the alternative, the Defendants ask that the Supreme Court adopt the decision and opinion of the Court of Appeals as its own decision and opinion in the above-entitled cause of action, thus furthering establishing and buttressing *Employers Mutual* as the law of Michigan.

The Defendants further respectfully request the award of such costs and attorney fees as to which they may be entitled under the court rules and statutes of the State of Michigan for having to defend themselves in the above-entitled cause of action.

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Dated: September 6, 2006

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/

STATE OF MICHIGAN)
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COUNTY OF OAKLAND)

PROOF OF SERVICE

Sandra Vertel, being first duly sworn according to law, deposes and states that on Thursday, September 7, 2006, she served a copy of the Defendants-Appellees' Supplemental Brief in the above-entitled cause of action on the following counsel of record in the said cause:

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Said service was effected by mailing the aforesaid copies to counsel listed above at their respective addresses as listed above by First Class United States Mail with postage fully prepaid.

Further affiant saith naught.

Sandra Vertel

Subscribed and sworn to before me this 7th day of September, 2006.

Notary Public for the County of Oakland, acting in the County of Oakland, State of Michigan.

My commission expires March 28, 2008.

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